U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 02 2006

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a "senior fellow." As of the date of filing, the petitioner was a postdoctoral researcher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability or a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the evidence submitted is sufficient and that the precedent decision on this classification, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Comm. 1998), "is so ambiguous and vague that it results in decisions that are inconsistent, arbitrary and capricious." By law, the director does not have the discretion to reject published precedent. *See* 8 C.F.R. § 103.3(c), which indicates that precedent decisions are binding on all Citizenship and Immigration Services (CIS) officers. To date, neither Congress[1] nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. In fact, one federal court has upheld *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215, as a valid precedent. *Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). Counsel's specific assertions will be addressed below.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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[1] Congress has amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dept. of Transportation*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

(B) Waiver of Job Offer.

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. degree in Molecular Biology Genetics from Wayne State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien

with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, molecular biology and genetics, and that the proposed benefits of his work, improved anti-viral agents, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. We disagree with counsel that this inquiry is too vague and subject to abuse. To demonstrate that the waiver of the labor certification requirement is warranted in the national interest, a petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner received his Ph.D. from Wayne State University in December 1999. Dr. [redacted] the petitioner's advisor at Wayne State University, discusses the petitioner's research at that institution. Specifically, the petitioner "helped to develop and employed a novel genetic system for analysis of ribosomal RNA function in bacteria that has become the leading technology for analysis of ribosomal RNA function *in vivo*." Dr [redacted] asserts that the five articles he coauthored with the petitioner are "held up" until patent protection is in place. The record, however, lacks letters from other laboratories confirming their use of the model, which would be expected if it is the "leading technology" for this type of analysis as claimed.

In March 2000, the petitioner joined the laboratory of Dr. [redacted] at Yale University as a postdoctoral researcher. In August 2000, Dr. [redacted] accepted the Chair of the Department of Biochemistry at the University of Washington in Seattle and the petitioner accompanied him, continuing as a postdoctoral researcher. In response to the director's inquiry as to whether the petitioner had received professional recognition in the field, Dr. [redacted] asserts that the petitioner's selection for two postdoctoral positions is evidence of the petitioner's contributions and distinction. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition is the acknowledgement that "the appointment is viewed as *preparatory* for a full-time academic and/or research career." (Emphasis added.) While serving in a postdoctoral position does not preclude eligibility, selection for an entry-level position and remaining at that level, even with a prestigious university, is not in and of itself persuasive evidence of the significance of the petitioner's influence in the field. At issue are the petitioner's accomplishments while in that position.

Dr. [redacted] praises the petitioner's abilities and compares him favorably with others in the field. Dr. [redacted] also discusses the importance of the petitioner's area of research. Regarding specific accomplishments, however, Dr. [redacted] states only that the petitioner's "experiments are providing valuable information that will facilitate the design of new antiviral drugs based on nucleotide analogs." Dr. [redacted] another professor at Yale, explains that nucleotide analogs are the most effective treatment for viral diseases such as AIDS, herpes and hepatitis. He then asserts that the petitioner has shed light on how nucleotide analogs interact with the TRNA nucleotidyltransferase, which "will" provide the foundation for the development of novel nucleotide analogs for use as drugs.

Dr. [redacted] a principal investigator at the National Cancer Institute, provides somewhat more detail. While counsel characterizes Dr. [redacted] s an independent reference, his Curriculum Vitae shows that he was a postdoctoral researcher at Yale, in the same department as the petitioner. His time at Yale overlapped with the petitioner's by several months. Dr. [redacted] sserts that the petitioner has investigated the use of nucleotides by the CCA-adding enzyme and the use of U2 small nuclear RNA as a substrate for the CCA-enzyme. The petitioner has also identified a single catalytically active subunit of the CCA-adding enzyme and collaborated on the crystal structure of the CCA-adding enzyme. Dr. [redacted] does not, however, provide any examples of this work being applied by other research teams.

The remaining letters are from more independent references. Dr. [redacted], a professor at the [redacted] College of Medicine and Secretary of the Genetic Society of America, asserts that she is familiar with the petitioner's work because it is within her area of expertise. She states that the petitioner has made "major contributions to understanding how the CCA-adding enzyme can generate a defined sequence of nucleotides without a template. As an example of this work, Dr. [redacted] asserts that the petitioner "proved that a single active site on the enzyme is responsible for addition of both C and A nucleotides." This work and a collaboration with the "famous laboratory headed by Dr. [redacted] emonstrated "a new view of how an enzyme active site can change during the course of a reaction – the implications of the work are vast!" As a result of this work, Dr. [redacted] asserts that an important question is now "close to a theoretical solution, paving the way for medical applications."

Dr. [redacted] Executive Officer of the RNA Society, asserts that he knows of the petitioner's work through its publication in the society's journal and other journals. Dr. [redacted] asserts that the petitioner is "providing a continuing and critical series of fundamental contributions to the field of RNA research and our understanding of the structure, function, and origins of DNA and RNA polymerases," which are targets for anti-cancer, anti-viral and other pharmaceutical agents. Dr. [redacted] concludes that the petitioner's work "is completely unique in this field, taking a perspective that no other researcher has been able to take on the most fundamental properties of these critical biological molecules."

While the independent reference letters are favorable, they provide no examples of how the petitioner has already had some degree of influence on the field as a whole. The record lacks letters from high-level officials at pharmaceutical companies expressing interest in the petitioner's work.

Several of the petitioner's references discuss the significance of the petitioner's publication record. Dr. [redacted] notes that the petitioner is "first author" of articles published in the prestigious *Journal of Biological Chemistry* and *RNA* and that he coauthored an article in *Cell*, "arguably the most prestigious scientific journal worldwide." In general, we will not presume the significance of an article solely from the prestige of the journal in which it appears. Rather, the content and number of citations can serve as more probative evidence of the article's significance. While Dr [redacted] asserts that the first author "is generally the key person in conducting the experiments and preparing the work for publication," the petitioner's first-authored articles had only been cited two and three times by independent research groups. These numbers are not significant.

The petitioner's article in *Cell* had been cited 17 times as of the date of filing. As acknowledged by Dr. Hopper, however, the petitioner is not the first author of this article. Moreover, it appears that Dr. [redacted] not Dr. [redacted] primarily directed this work. Finally, the petitioner has not demonstrated that 17 citations are significant for articles published in *Cell*. While many of the citations are favorable, [redacted] and [redacted] assert that none of the papers on the structures of the CCA-adding enzymes, including the petitioner's article in *Cell,* have "satisfactorily resolved the key questions." Rather, the article references a subsequent article by Dr. [redacted] in *Nature,* which the petitioner did not coauthor, as one of two articles that "zero in on the problem with the needed structures of ternary complexes of enzyme, RNA and nucleotide."

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.